81-1992

Case No. _____

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED TRANSPORTATION UNION,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether Section 702 of the Regional Rail Reorganization Act of 1973, as amended by Section 1143(a) of the Northeast Rail Service Act of 1981 (Public Law 97-35, August 13, 1981, 95 Stat 662) (hereinafter the amended statutory provision is referred to as "§ 702"), is in conflict with and supersedes existing collective bargaining agreements between Consolidated Rail Corporation and the United Transportation Union where that statute and the agreements are in conflict?

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The Petitioner, the United Transportation Union, respectfully prays that a writ of certiorari issue to review the judgments of the Special Court of the United States District Court under the Regional Rail Reorganization Act of 1973, entered in its Case Nos. 82-4 and 82-7 on April 7, 1982.

OPINION BELOW

The opinion and judgments of the Special Court are reproduced in the Appendix here as Appendix A.

JURISDICTION

The Judgment of the Special Court in these two cases was entered on April 7, 1982. This Petition is timely filed. The Court's jurisdiction is invoked pursuant to § 1152(b) of the Northeast Rail Service Act of 1981 (95 Stat. 676). The North-

east Rail Service Act of 1981 was Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35 (Aug. 13, 1981).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Northeast Rail Service Act of 1981, the Regional Rail Reorganization Act of 1973, and the Railway Labor Act are reproduced in the Appendix.

STATEMENT

Proceedings Below

Petitioner, the United Transportation Union ("UTU"), seeks certiorari to the Special Court, Regional Rail Reorganization Act of 1973 in Case Nos. 82-4 and 82-7 before that Court. No. 82-4 was filed by the UTU on or about February 4, 1982, pursuant to § 1152(a) of the Northeast Rail Service Act of 1981 ("NRSA"), seeking a declaration of rights as to § 702 of that Act. No. 82-7 was filed by Consolidated Rail Corporation ("Conrail") against the UTU, seeking to enjoin a strike by the UTU over § 702 rights. Conrail further sought to have its view of § 702 adopted by the Special Court.

Under § 702, Conrail was granted certain authority with respect to the separation of employees with severance pay, as well as the right to refrain from filling positions in number equal to the severed employees. That right to separate and refrain from filling positions is specified at subparagraphs (a) to (g) of § 702. In substance, it provides for separations with severance payments based on years of service, up to a maximum of $25,000. It further provides for Conrail to withhold filling fireman or brakeman positions in a number equal to the number of employees severed. A dispute arose between the UTU and Conrail as to whether that authority to sever employees and refrain from filling positions could be exercised by Conrail to sever employees and refrain from filling positions even where

such action would be in conflict with the terms and provisions of labor agreements between the UTU and Conrail in effect at the time of the enactment of the law. Involuntary severance threatened by Conrail and refusal to permit employees to fill positions vacated by severed employees would violate UTU agreements. (Appendix E, Stipulation.)

The UTU contended that § 702 was not so intended; that it could be and should be read not to supersede existing labor agreements. Conrail had acted and was threatening to further act under § 702 to involuntarily sever employees and refrain from filling positions where such action was admittedly in violation of existing UTU/Conrail labor agreements. Conrail contended that § 702 gave it authority to override UTU agreements in those circumstances.

The Special Court granted Conrail preliminary injunctive relief in Case No. 82-7 on or about February 22, 1982, against the threatened strike, and then consolidated Case Nos. 82-4 and 82-7 for purposes of hearing March 10, 1982 on the merits.

Prior to the March 10, 1982 hearing, both the UTU and Conrail filed Motions for Summary Judgment predicated upon a set of fact stipulations, exhibits, and pleadings before the Court. At the time of the March 10, 1982 hearing, the United States was granted leave to intervene as a Defendant in Case No. 82-4.

After hearing March 10, 1982, the Special Court issued an Opinion on March 31, 1982, upon which judgment was entered in Case Nos. 82-4 and 82-7 on April 7, 1982. That judgment declared rights under § 702, in substance concluding that § 702 conferred authority on Conrail to sever employees involuntarily and refrain from filling positions without regard to whether such actions were in conflict with and would violate existing labor agreements with the UTU. The Special Court, in short, concluded that § 702 was in conflict with the existing agree-

ments and did supersede existing agreements where in conflict. Finally, the Special Court declined to enter a permanent injunction as prayed for by Conrail in Case No. 82-7 for the reason that, based upon various representations, in light of the Court's resolution of the dispute underlying the strike threat, no strike threat was imminent.

The matter at issue in the instant Petition for Certiorari is the Court's declaration of rights under § 702.

Facts

The facts in this case were not in dispute. The parties presented a lengthy Stipulation on factual points to the Special Court. (Appendix E.) Numerous reported cases reflect further background facts pertinent to this case. We will review those facts here.

This litigation concerns the authority of Conrail as to the number of employees or crew members that should be employed to work on Conrail trains. The two jobs particularly involved here are firemen and brakemen. Firemen and brakemen (as well as conductors) on Conrail are represented in collective bargaining by the UTU.

The assignment of firemen on locomotives has been known over the years as the "fireman manning" issue, while that regarding brakemen has been part of what is referred to as the "crew consist" issue. On August 13, 1981, when the NRSA became law, Conrail and the UTU were party to collective bargaining agreements regarding both fireman manning and crew consist. These agreements specified the number of firemen or brakemen to be assigned to Conrail trains. (Stipulations A and B, Appendix E.)

A. Firemen manning on Conrail: August 13, 1981.

The agreement as to fireman manning centers upon the national 1972 Fireman Manning and Training Agreement, to

which Conrail's predecessors were parties and the terms of which were carried forward on Conrail. (Stipulation A, Appendix E). This 1972 Agreement applies to all major railroads in the United States, not just Conrail. It was negotiated nationally and resolved a nationwide dispute. It has remained the centerpiece of the fireman manning rules on all railroads to this date. Generally, it was anticipated there that "fireman" would be a training position for "engineer." Thence, engineers generally carry fireman seniority rights, even after they are promoted to engineer and are working as engineers.

Under the Fireman Manning Agreement, each hostler position and passenger train must have a fireman assigned. These are "must fill" positions. All other trains or assignments are designated "blankable" under the Agreement. This means that that train or assignment may be operated without a fireman if no fireman exercises seniority to that train or assignment. (Stipulation A, Appendix E).

Further, under the agreement the carrier makes certain prescribed calculations that determine how many firemen it is to employ in each seniority district. After the determinations are made — this is done quarterly — and the number of firemen which must be employed is ascertained, employees may exercise their seniority or bid to positions on freight or passenger trains or crews. If no employees bid to must-fill positions, the carrier may force an employee to a must-fill position.

After the bidding and force assignments are made, the carrier may operate without a fireman any train or crew to which seniority has not been exercised for a fireman position. This is known as "blanking" the fireman position on that train or crew.

One further provision of the Fireman Manning Agreement is pertinent. Under the agreement, where there is a decline in business, the carrier may furlough firemen under a prescribed formula. This right to furlough firemen in a decline in business

period is limited, however, in regard to "protected" firemen. "Protected" firemen are those who had seniority at the time of the Fireman Manning Agreement in 1972. (Stipulation A, Appendix E).

Obviously the fewer firemen there are, the more positions will go unbid and the more blanked positions there will be. Conversely, the more firemen, the fewer positions will be blankable. It is also a fact that in a decline in business, some firemen who have been working as engineers will no longer be able to hold an engineer job and will bid for a fireman job, decreasing the resultant number of blankable jobs.

B. Crew consist on Conrail: August 13, 1981.

As to "crew consist" and the number of brakemen to be employed, Conrail was party to agreements with the UTU on August 13, 1981. These were not national agreements, however. Traditionally, crew consist agreements have been negotiated locally, not nationally. *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line*, 383 F.2d 225 (D.C. Cir. 1967). Those agreements on Conrail were negotiated with UTU Committees generally between 1978 and 1981. Indeed, the last such agreement was finalized through arbitration as late as September, 1981.

The UTU-Conrail crew consist agreements provide that the standard minimum one conductor, two brakemen train crew may be reduced to one brakeman only under certain conditions. Under the agreements, Conrail may reduce its crews and eliminate the second brakeman by attrition, i.e., death, retirement, resignation, dismissal for cause, or severance. Under the agreements, each position is designated as "must fill" or "blankable." Must fill positions must be filled. Blankable positions, such as second brakeman, may be left vacant if no protected employee bids them. (Stipulation B, Appendix E).

Plainly, if business turned down, there would be fewer job assignments, and, as a result, protected trainmen would bid, for example, for second brakeman positions, and, as a result, fewer second brakeman positions would be blankable.

What existed on August 13, 1981 then were negotiated agreements as to fireman manning and crew consist, both of which had, as centerpieces, the rights of protected employees to positions — either fireman or second brakeman jobs — when regular assignments were not available due to less business and fewer trains.

C. Conrail's implementation of section 702.

Subsequent to August 13, 1981, pursuant to § 702, Conrail divided its system into work locations, determined the numbers of what it deemed to be excess firemen and brakemen at those locations, and notified employees that they could take separation with the money payments permitted in § 702, $350 per month of service up to $25,000. Conrail made known it intended to involuntarily sever employees if it did not get sufficient volunteers, even though such involuntary terminations would be in conflict with UTU agreements. Pursuant to this first offer for separations, 600 employees (firemen and brakemen) were voluntarily severed on or about December 7, 1981. Conrail then blanked (refused to fill) 600 positions at that time (firemen and brakemen), even though "protected" employees could otherwise have bid for those firemen or second brakemen jobs under the existing UTU labor agreements discussed above. Thereafter, Conrail made a second solicitation for voluntary terminations and on February 22, 1982, an additional 1,660 employees took voluntary terminations. Again, Conrail will blank a corresponding number of positions (fireman and/or second brakemen), even though there are protected firemen and/or brakemen who could bid to those positions under existing agreements. (Stipulation D, Appendix E).

Further, separations and blanking of positions will continue to occur, Conrail has advised, until it separates and blanks 4,600 employees and positions. If there are insufficient voluntary terminations, Conrail intends to dismiss employees involuntarily and blank positions thereafter as well. (Stipulation D, Appendix E).

Conrail concedes that but for § 702, it could not involuntarily terminate employees, as it plans here, and could not blank positions as it has done and will continue to do here because such actions would be in violation of UTU agreements. (Stipulation D, Appendix E).

The Court below held in both Case Nos. 82-4 and 82-7 that the provisions of § 702 are in conflict with UTU/Conrail labor agreements, particularly the fireman manning and crew consist agreements and further held that such agreements are overridden by § 702. The Court then permits Conrail to sever firemen and brakemen involuntarily and to refrain from filling positions, all in a manner admittedly contrary to the rights established in the referred to agreements.

REASONS FOR GRANTING THE WRIT

The decision below involves important questions of federal law which have not been, but should be, settled by this Court. Specifically, in interpreting § 702 to override UTU agreements, the Court has construed the statute in a manner which imposes a substantive resolution of a labor-management collective bargaining dispute. Such a substantive resolution of a collective bargaining dispute is a step virtually unprecedented and of the utmost significance in the development of the federal laws regarding collective bargaining in the railroad industry. Further, the Court below has interpreted § 702 to supersede labor agreements negotiated and fashioned in accordance with other federal labor legislation, specifically the labor provisions of the RRRA of 1973, 45 U.S.C. § 774, and the Railway Labor

Act, 45 U.S.C. §§ 151-160. The nature of the reconciliation of these three federal statutes governing UTU/Conrail labor agreements should be made by this Court.

1. The Court below read § 702 unnecessarily broadly thereby setting up a collision with existing labor agreements when it could have reconciled § 702 and the agreements to give meaning to each.

Reconciliation of § 702 and the labor agreements would have avoided finding Congressional intervention into the substantive resolution of collective bargaining disputes. Such avoidance has been and should continue to be a cornerstone of the federal labor law.

The statutory language did not suggest nor require that § 702 override the labor agreements. The Court below does not point to language so requiring. Indeed, the language of § 702 nowhere explicitly deals with the relationship between the labor agreements and Conrail's authority under the law. The scheme of the law is to permit Conrail to pay severed employees $350 per month of active service with Conrail or its predecessors, up to a maximum of $25,000. This is a "termination allowance." The law, at § 702, provides that Conrail may "designate for separation" employees with such a termination allowance if Conrail does not get sufficient volunteers for severance. No mention is made as to the collective bargaining agreements. Further, it is provided under the law that, as to employees separated, Conrail "shall," in the case of firemen, and "may," in the case of brakemen, refrain from filling one position for as many employees as are severed under the authority in § 702. Still, no mention is made of the collective bargaining agreement.

What we have then is statutory language which does not say anything specific about the labor agreements. It does not say that § 702 supersedes, displaces, or in any other manner elimi-

nates the labor agreements. Nor, of course, does it specifically say that the labor agreements, where in conflict with the statute, necessarily survive the statute. The Court below, however, without warrant, has concluded from this silence in the statute that the language offers "compelling force" in support of finding that the labor agreements are superseded.

The Court below similarly views the legislative history in this manner. The legislative history did not address the matter of the survival of the labor agreements in the face of § 702. The passages of the legislative history quoted and cited by the Court below do not make any declaration that existing labor agreements are in conflict with and superseded by § 702. Nevertheless, the Court below asserts that legislative history supports finding such conflict and supersession. The Court below permits such legislative history to support Congressional intervention via § 702 in the substantive resolution of a collective bargaining dispute.

Such intervention by federal law should not be found where the statute itself and the legislative history do not explicitly reflect a Congressional intent to so intervene, but rather are silent on the point. Avoidance of finding Congressional intervention in resolving the substantive terms of a collective bargaining dispute is particularly appropriate in this case. The very subject matter at issue — fireman manning and crew consist — has been (1) the subject of many years of collective bargaining confrontation, a confrontation the substance of which Congress has traditionally avoided resolving itself, and (2) in the case of crew consist, was just, in 1979-1981, resolved between the UTU and Conrail.

In the absence of specific direction in § 702, we believe the history of fireman manning and crew consist disputes below show it would be error to conclude that Congress would have intended to obliterate agreements on these two subjects by the stroke of a pen.

Both disputes go back at least to 1959 when a fireman was required on locomotives and at least two and sometimes three brakemen were required by agreements. The railroads predecessor to Conrail were parties to those agreements. In 1959, the railroads sought to alter this arrangement with sweeping changes. The railroads proposed elimination of all rules requiring firemen, exept in passenger service. They proposed a rule to "give management the unrestricted right to decide when and if a fireman should be used in freight and yard service". This history is concisely chronicled in *In re Eastern, Western and Southeastern Carriers' Conference Committees*, 41 LA 673 (1963), at 682 *et seq.* (Board of Arbitration).

At the same time in 1959, the carriers sought to negotiate sweeping changes in the train crew. The then existing crew consist rules, unlike the national fireman manning rules, were developed on a more local or railroad-by-railroad basis. *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co., supra*. A fairly standard train crew, however, consisted of one conductor and two or more brakemen. The industry sought to abolish all rules on crew consist so as to leave the carriers with the untrammeled right to determine train crew size or "crew consist". The particular object of the industry was to eliminate the second and/or third brakeman. Needless to say, a serious confrontation was precipitated as to both fireman manning and crew consist.

The confrontation that ensued is reflected in numerous reported cases. *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 327 U.S. 284 (1963); *In re Eastern, Western and Southeastern Carriers' Committee, supra; Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, Burlington & Quincy*, 331 F.2d 1020 (D.C. Cir. 1964), *affirming* 225 F.Supp. 11 (D. D.C. 1964), *cert. den.* 377 U.S. 918 (1964); *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt Railroad*, 385 F.2d 581 (D.C. Cir. 1967);

Chicago & N.W. R. Co. v. *United Transportation Union*, 402 U.S. 570 (1971). As to the dispute on the Penn Central, the major Conrail predecesor, *In re Penn Central Transportation Co.*, 347 F.Supp. 1356 (E.D. Pa. 1972).

Throughout this entire time, from 1959 to 1981, spanning 22 years, Congress refrained from intervening to resolve, by itself, the substantive dispute between labor and management over fireman manning or crew consist. Congress retarded strike action; it created arbitration to seek a resolution. But Congress never, by itself, stepped in and decided the substance of the disputes.

If the 1981 law is interpreted as was done below, for the first time Congress has so intervened. Such intervention would not only be unique in rail industry collective bargaining disputes, but generally so under the federal labor laws. As such, it would mark a radical departure in federal labor law. For that reason alone, the Petition here should be granted.

The departure here is the more unlikely and unwarranted because the UTU and Conrail had just, virtually on the eve of this legislation, concluded crew consist agreements as a result of bargaining from 1978 to 1981.

Under § 504 the RRRA of 1973, 45 U.S.C. § 774, Conrail and the unions were to negotiate new agreements. The UTU undertook such negotiations and reduced crew agreements were not surprisingly put on the table by Conrail. Such agreements were made after a protracted negotiating process extending from 1978, when the reduced crew proposals were made, right up to 1981, when, through final and binding arbitration, effective September 1, 1981, outstanding disputes were settled.

Four Conrail crew consist agreements were made. The first covering eight General Committees was made on September 8, 1978, two were made on December 30, 1980, and one on January 3, 1981. In sum then, between 1978 and 1981, crew

consist agreements were made between Conrail and all UTU General Committees. These UTU-Conrail agreements provided substantial concessions on crew consist by the Union. Thus, on the eve of the 1981 law, the UTU and Conrail had just negotiated at length to give Conrail substantial rights to reduce crews. In that light, Congressional intervention to resolve the substantive dispute raises important issues of federal labor law.

In the history of the dispute noted above, both nationally in the entire industry and on Conrail itself, Congressional abstention from resolving the substantive collective bargaining issues is manifest. The Court below, in reading § 702 to require or permit supersession of UTU agreements on fireman manning and crew consist, departed from this tradition. This Court should consider this important issue under the federal labor laws.

2. The decision of the Court below raises a further important question under the federal labor laws, reconciliation of the Regional Rail Reorganization Act of 1973, the Railway Labor Act, 45 U.S.C. §§ 151-160, and the 1981 Northeast Rail Service Act. The UTU agreements that the Court below found superseded by § 702 were negotiated pursuant to the explicit mandate of § 504(d) of the 1973 law, 45 U.S.C. § 774(d). This mandate was to negotiate new system agreements. That was done, as has been stated. The fireman manning agreement was continued and crew consist was renegotiated, giving substantial concessions to Conrail. These agreements, once in place, are maintained and exist pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to which Conrail is subject. (45 U.S.C. § 772(a), as amended). The agreements are subject to change only in accord with the detailed Railway Labor Act procedures.

The language of § 702 of the 1981 law makes no reference to either the 1973 law nor the Railway Labor Act, nor agreements made or maintained pursuant thereto. In that light, § 702 and the Railway Labor Act, as well as the 1973 law, should be

reconciled to permit the obligations created by the latter two statutes and agreements established or maintained thereunder to survive, preserving the important policies and interests inherent in those statutes.

There is substantial indication reconciliation of the three statutes, not a conflict among the three, was contemplated by Congress. While the 1981 law purports to repeal Title V of the Regional Rail Reorganization Act of 1973, that does not reflect any intent to invalidate the agreements such as the UTU's agreements negotiated thereunder. Indeed, in that one repeal provision as to Title V, special care is taken to protect benefits accrued during the prior period. Section 1144(a)(1)-(4) of the Northeast Rail Service Act of 1981.

Further, there is no indication Congress intended to supersede the Railway Labor Act, 45 U.S.C. § 151, *et seq*. The Railway Labor Act has as its central purpose the preservation of the *status quo* pending negotiated changes. *Detroit, Toledo & Shore Line R. Co.* v. *United Transportation Union*, 396 U.S. 142 (1969). The Regional Rail Reorganization Act of 1973 made Conrail subject to the Railway Labor Act as a carrier. 45 U.S.C. § 772(a), as amended. The UTU agreements on fireman manning and crew consist, while originally negotiated or established under the 1973 Regional Rail Reorganization Act, exist now under the Railway Labor Act and cannot be modified, except through the negotiating process prescribed therein. 45 U.S.C. § 156, *et seq.; Detroit, Toledo & Shore Line R. Co., supra*. In the instant case, we are dealing with explicit written agreements, not unwritten practices, as was the case in *Detroit, Toledo & Shore Line*. Given the central place of the Railway Labor Act in rail labor disputes, its long history, and its clear requirement that agreements survive, except where negotiation changes them, this Court should decide this important issue of federal labor law as to whether the 1981 law should be deemed

to have superseded agreements created and maintained under the other federal rail labor laws.

CONCLUSION

The decision below raises two important questions of federal labor law in the railroad industry: (1) whether the Congress intended, by statute, to impose a substantive resolution of a long collective bargaining dispute; (2) the reconciliation of the 1981 Northeast Rail Service Act with rights and duties established under other federal labor law, particularly the Railway Labor Act. For these reasons, a writ of certiorari should issue to the Special Court to review its Opinion and Judgment.

Respectfully submitted,

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